STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Murray, PJ, and Neff and Donofrio, JJ (Docket No. 244742)
Talbot, PJ, and Cavanagh and Meter, JJ (Docket No. 264862)

SBC MICHIGAN,

Plaintiff-Appellant,

vs.

MICHIGAN PUBLIC SERVICE COMMISSION,

Defendant-Appellee.

Supreme Court No. 134493
Court of Appeals No. 264862
MPSC Case No. U-13079

SBC MICHIGAN,

Plaintiff-Appellee,

vs.

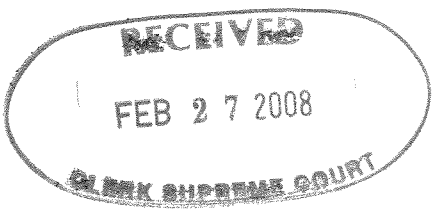
MICHIGAN PUBLIC SERVICE COMMISSION,

Defendant-Appellant.

Supreme Court No. 134500
Court of Appeals No. 264862
MPSC Case No. U-13079

BRIEF *AMICUS CURIAE* OF

THE TELECOMMUNICATIONS ASSOCIATION OF MICHIGAN



Sherri A. Wellman (P38989)
Michael C. Rampe (P58189)
MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
One Michigan Ave., Ste. 900
Lansing, MI 48933
(517) 487-2070

Attorneys for *Amicus Curiae*
Telecommunications Association of Michigan

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

CASES

STATUTES

JURISDICTIONAL STATEMENT

The Telecommunications Association of Michigan (Association) views the jurisdictional statement contained in SBC Michigan's January 25, 2008 Appellant Brief in Docket 134493 (pp xi-xii), and the jurisdictional statement contained in SBC Michigan's February 15, 2008 Appellee Brief in Docket 134500 (p viii), as complete and correct.

The Association views the first paragraph of the jurisdictional statements contained in the Michigan Public Service Commission's (Commission) January 25, 2008 Appellant Brief in Docket 134500 (p viii), and the Commission's February 15, 2008 Appellee Brief in Docket 134493 (p viii), as complete and correct. However, the Association disagrees with the second paragraph of the Commission's jurisdictional statements (submitting "that leave was imprudently granted") for the reasons set forth in SBC Michigan's February 15, 2008 Appellee Brief (pp viii, 18-19).

STATEMENT OF QUESTIONS

I. "[W]hat legal framework appellate courts should apply to determine the degree of deference due an administrative agency in its interpretation of a statute within its purview;"

This question may not be answered with a "yes" or "no."

II. "[W]hether the Court of Appeals erred in deferring to the Michigan Public Service Commission's interpretation of MCL 484.2502(1)(a);"

SBC Michigan says:	"Yes"
The Commission says:	"No"
The Court of Appeals would say:	"No"
Amicus Curiae Telecommunications Association of Michigan:	"Yes"

III. "[W]hether the Commission abused its discretion in applying this statutory provision to a carrier's diagnostic mistakes;"

SBC Michigan says:	"Yes"
The Commission says:	"No"
The Court of Appeals would say:	"No"
Amicus Curiae Telecommunications Association of Michigan says:	"Yes"

STATEMENT OF QUESTIONS (CONT'D)

IV. "[W]hether the Court of Appeals erred in holding that the Commission lacks the jurisdiction to prohibit the imposition of a fee for a carrier's inspection of its own services when that inspection eliminates the carrier as the cause of a service disruption."

SBC Michigan says:	"No"
The Commission says:	"Yes"
The Court of Appeals would say:	"No"
Amicus Curiae Telecommunications Association of Michigan:	Does not address this issue.

I. MATERIAL FACTS AND PROCEEDINGS

The Telecommunications Association of Michigan does not take exception to the factual presentations of SBC Michigan or Commission in their briefs.

II. INTRODUCTION

The Telecommunications Association of Michigan (Association) is an association of local exchange carriers that provide local telephone service and other telecommunication services throughout the state of Michigan. The Association's members are "local exchange carriers," and "telecommunication providers," as defined in the Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.* As a result, the Association's members are directly impacted by the MTA's provisions governing local exchange service and telecommunication service, including the provision at issue in this appeal, § 502(1)(a); MCL 484.2502(1)(a). Administrative agency and court rulings regarding the application of the MTA affect not only the parties to a case, but the telecommunications industry generally.

In its December 13, 2007 Order granting leave, the Court advised that "[p]ersons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, to be filed no later than February 27, 2008" (SBC Appendix 143a – 144a). The Association's members are concerned about the manner in which the Commission and the judiciary interpret and apply the MTA, and thus are a "group[] interested in the determination of the issues presented." As fully explained herein, the Court of Appeals erred in accepting the Commission's reading of § 502(1)(a) as applying to a provider's unintentional diagnostic

mistake. This Court should reject the Commission's "strict liability" reading of § 502(1)(a), reverse the Commission and the Court of Appeals, and rule that the term "false" contained in § 502(1)(a) of the MTA encompasses only statements or representations that are intended to be false.

In its December 13, 2007 Order granting leave, the Court set forth four issues for briefing (SBC Appendix, 143a – 144a). The Association has a strong interest in this case because of its impact on the telecommunication industry as a whole. Of the issues listed in the Court's December 13, 2007 Order, the two that most affect the industry are the second issue ("whether the Court of Appeals erred in deferring to the Michigan Public Service Commission's interpretation of MCL 484.2502(1)(a)"), and the third issue ("whether the Commission abused its discretion in applying this statutory provision to a carrier's diagnostic mistakes"). Consequently, this brief addresses only the second and third issues.

III. STANDARD OF REVIEW

The applicable standard of review, and the precise level of deference accorded the Commission's ruling, are contested issues in this appeal. SBC Michigan states that the applicable standard of review is "de novo," and that the Commission's interpretation of § 502(1)(a) is only entitled to "respectful consideration" (SBC Appellant Brief, pp 6, 26-28). The Commission, conversely, asserts that the applicable standard of review is whether the appellant has "shown by clear and satisfactory evidence that the PSC's order is either unlawful or unreasonable," and that its rulings are entitled to some level of deference (Commission Appellant Brief, pp 8, 14). As noted above, the Association is

specifically interested in interpretations of the MTA that affect the telecommunication industry, and as set forth below, the Commission's ruling regarding the meaning of § 502(1)(a) requires reversal under either party's standard of review.

IV. THE COMMISSION'S APPLICATION OF § 502(1)(A) IS INCORRECT

The Association agrees with SBC Michigan's Briefs in both dockets regarding the proper interpretation of § 502(1)(a), including SBC Michigan's discussion of why the "law of the case" doctrine has no applicability here. The Association therefore endeavors not to repeat SBC Michigan's positions, but instead offers additional argument from an industry perspective for the Court's consideration.

The Commission's primary argument is that § 502(1)(a) is a "strict liability statute," and hence any untrue statement, irrespective of intent, constitutes a violation of the MTA (Commission Appellant Brief, pp 26-27). The Court must reject this position. The Commission's application of § 502(1)(a) produces an absurd result, and is clearly contrary to the legislative intent. Thus, even if the Court were to accept the Commission's urging of a deferential standard of review, it should reject the Commission's clearly incorrect reading of § 502(1)(a). Accord, *United Parcel Service, Inc v Bureau of Safety and Regulation*, 277 Mich App 192, 203; __ NW2d __ (2007) (noting that a "clearly wrong" statutory interpretation warrants no deference).

Section 502(1)(a) of the MTA states:

> (1) A provider of a telecommunication service shall not do any of the following:
>
> (a) Make a statement or representation, including the omission of material information, regarding the rates, terms, or conditions of providing a telecommunication service that is false, misleading, or deceptive. As used in this subdivision, "material

> information" includes, but is not limited to, all applicable fees, taxes, and charges that will be billed to the end-user, regardless of whether the fees, taxes, or charges are authorized by state or federal law.

The Legislature's intent in enacting § 502(1)(a) is clear on its face. The Legislature wanted to protect end user customers from unscrupulous business practices by prohibiting telecommunication providers from making false, misleading or deceptive statements.[1] However, nothing in the statutory language leads to the conclusion that the Commission intended to penalize innocent mistakes. Thus, as fully explained below, the Commission's reading of § 502(1)(a) as a "strict liability" statute is inconsistent with the legislative intent, produces an absurd result, and is therefore clearly wrong.

The Court Appeals' June 14, 2004 Opinion stated that SBC Michigan's and the Commission's views on the meaning of § 502(1)(a) were "equally plausible" (2004 WL 1366003; SBC Appendix 127a). The Court of Appeals then made the following assessment:

> Although it is undisputed that the statements made to complainants were wrong, after carefully reviewing the record, we find that the evidence does not support a finding that Ameritech acted with the intent to mislead. The evidence illustrates the problem with the Rovases' service was intermittent, and difficult to diagnose. It appears to us that the technician mistakenly concluded the problem was inside, but there is no evidence this action was more than a mistake. If we were members of the PSC we would have concluded that Ameritech did not violate MCL 484.2502(1)(a) when it indicated to the customers in this case that the problem with their phone originated inside the house, and therefore they would be billed $71.00 for the service call, a determination that was subsequently proven to be incorrect. However, because we must not substitute our judgment for that of the PSC, and must review a decision of the PSC under a

[1] The first sentence of § 502(1)(a) is not limited to statements and representations to end user customers. However, the second sentence of the provision specifically references "the end-user," as do many other subsections listed in § 501, making the protection of end user customers the section's primary focus.

> deferential standard of review, we find no error. [SBC Appendix 127a (citation omitted).]

The Court of Appeals thus understood that SBC Michigan's technician did not intend to mislead the Complainants, and was guilty of nothing more a mistake. The Association agrees with this conclusion. Importantly, the Court of Appeals' own view was that no violation of § 502(1)(a) occurred as a result of the mistake. The Association agrees with this conclusion as well. Unfortunately, the Court of Appeals fumbled the ball just short of the goal line when, instead of adopting its own reasonable interpretation of § 502(1)(a), it simply deferred to the Commission's absurd one.

This Court will consult a dictionary to determine the meaning of an undefined statutory term. *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007). The Court of Appeals, in its 2004 Opinion, consulted a dictionary and cited four different definitions of "false," some of which involved deceptive intent (e.g. "lying" or "treacherous") and some of which did not (e.g., "not true" or "erroneous") (SBC Appendix 126a). The Court of Appeals therefore had to choose the most appropriate definition for purposes of § 502(1)(a). Unfortunately, the Court of Appeals abdicated its responsibility to appropriately define the term "false," and simply deferred to the Commission, which was clearly wrong.

As this Court has explained, when a dictionary provides multiple definitions for a word, "it is important to determine the most pertinent definition of a word in light of its context." *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 684 n 62; 719 NW2d 1 (2006) (emphasis added). Hence, neither the Commission nor a Court may indiscriminately pick one of multiple dictionary definitions for a term, but must instead choose the

definition best suited for the context. In this case, the Court of Appeals failed to exercise its judicial duty and select the "most pertinent definition." As thoroughly set forth in SBC Michigan's briefs, the doctrine of *noscitur a sociis* ("it is known from its associates") makes clear that "false," in the context of the words with which it is associated, means an intent to mislead or deceive, rather than simply "not true" (SBC Appellant Brief, pp 31-33).

Not only did the Commission (and Court of Appeals by default) define "false" in a manner inconsistent with its statutory context, its ruling produced an absurd result. In reviewing statutory language, this Court avoids "absurd results." *Jennings v Southwood*, 446 Mich 125, 133; 521 NW2d 230 (1994); *Salas v Clements*, 399 Mich 103, 109; 247 NW2d 889 (1976). The Commission erred in choosing a definition of "false" that produced the absurd result of penalizing innocent mistakes. The Court of Appeals perpetuated the Commission's error by simply deferring to the Commission's ruling, rather than adopting its own, sensible, reading of the provision.

In enacting § 502(1)(a), the Legislature clearly wanted to prohibit deceptive business practices. The Legislature's concern was legitimate. Deceptive business practices can, for example, result in customers being tricked into subscribing for services that they do not really want or need, or a provider imposing charges higher than the customer's reasonable expectations, both of which harm the public. Section 502(1)(a) prohibits such unscrupulous behavior. Innocent mistakes, however, are not within this category.

The Commission would treat innocent mistakes on par with intentionally false, misleading, or deceptive statements. As such, the Commission presumes that the

Legislature intended to make telecommunication providers absolute guarantors of all statements made by their employees. Such a reading is absurd. The Commission's ruling only encourages a provider to avoid making a "false" statement in violation of § 502(1)(a) by avoiding making any affirmative statements to customers altogether, and instead hedging on all statements or representations. If SBC Michigan had told the Complainants that it could not commit to a position on whether their service problem was caused by their inside wiring (or that it had "no idea" about the source of the problem), no false statement would have occurred. These types of hedged and uncommitted statements would protect against any subsequent finding that a provider made a "false" statement because the provider never made any factual assertion. So long as the hedged statement had some basis, the provider would avoid any violation of § 502(1)(a) on a "false" statement theory.

The curtailment of open communications between providers and customers, however, could not have been what the Legislature had in mind when it enacted § 502(1)(a). The Legislature could not have intended to place providers in a defensive posture, viewing their own customers as enemies, while trying to communicate with them. The Legislature certainly could not have contemplated requiring providers to preface all statements with protective disclaimers in the event that a statement was subsequently discovered to contain an inaccuracy. To presume that the Legislature desired to make a telecommunication provider an absolute insurer of the accuracy of statements issued by its employees and representatives is simply not logical.

The Commission's reading of § 502(1)(a) goes far beyond the Legislature's goal to prohibit providers from engaging in dishonest practices, and is ludicrous. Thus, as

between a definition of "false" that involves an intentional falsehood (*e.g.* "lying" or "treacherous") and one that does not (*e.g.*, "not true" or "erroneous"), only the former avoids this absurdity.

As a result of the forgoing, the Court of Appeals' statement that the Commission's and SBC Michigan's readings of § 502(1)(a) were "equally plausible" is acceptable only in a theoretical sense. The Commission's view of § 502(1)(a) cannot withstand any practical scrutiny, and hence only SBC Michigan's reading of the provision was truly "plausible."

The Commission argues that SBC Michigan's position regarding § 502(1)(a) is essentially a request for a judicial "re-write" of the MTA (Commission Appellant Brief, p 30). The Association does not request the Court to re-write the MTA. The Association does not ask the Court to substitute its own policy judgments for those of the Legislature, nor does it request that the Court add language to the MTA or ignore language contained within it. As the Court of Appeals recognized, the MTA does not define "false" (SBC Appendix 126a), and so the Association asks this Court perform the duty that the Court of Appeals abdicated, and choose, among the multiple dictionary definitions of the term, the one that fits the legislative intent, *Feyz*, *supra*, and avoids absurdity.

The Commission attempts to bolster its "strict liability" theory by noting that some criminal statutes penalize behavior even in the absence of a specific "intent" element (Commission Appellant Brief, p 28). This argument is a red herring. The examples that the Commission cites are the crimes of criminal sexual conduct, carrying

a concealed weapon, and narcotics possession. These are all serious criminal offenses, and certainly do not equate to an inaccurate telephone repair diagnosis.

The Commission argues that having to prove intent would "clearly frustrate the regulatory purposes of the statute," would render § 502(1)(a) "unenforceable," and give carriers "carte blanche authority to violate that provision with impunity" (Commission Appellant Brief, p 29). The Association does not condone dishonest practices, nor would acceptance of the SBC Michigan's reading of § 502(1)(a) prevent the Commission from addressing such practices. As noted, the "regulatory purpose" of § 502(1)(a) is to prohibit telecommunication providers from engaging in unsavory business practices. Innocent mistakes simply do not fall into this category. Moreover, requiring proof of intent is by no means unreasonable, and is indeed very appropriate, given the level of fines that are possible under § 601 of the MTA.[2]

---

[2] Section 601, MCL 484.2601, provides:

> If after notice and hearing the commission finds a person has violated this act, the commission shall order remedies and penalties to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of the violation, including, but not limited to, 1 or more of the following:
>
> (a) Except as provided in subdivision (b), the person to pay a fine for the first offense of not less than $1,000.00 nor more than $20,000.00 per day that the person is in violation of this act, and for each subsequent offense, a fine of not less than $2,000.00 nor more than $40,000.00 per day.
>
> (b) If the provider has less than 250,000 access lines, the provider to pay a fine for the first offense of not less than $200.00 or more than $500.00 per day that the provider is in violation of this act, and for each subsequent offense a fine of not less than $500.00 or more than $1,000.00 per day.
>
> (c) A refund to the ratepayers of the provider of any collected excessive rates.
>
> (d) If the person is a licensee under this act, that the person's license is revoked.
>
> (e) Cease and desist orders.

Continued on next page

Finally, the Court must reject the Commission's contention that its ruling was a "principled outcome" (Commission Appellant Brief, p 25). As SBC Michigan points out, something as simple as a "typographical error" or electronic "bug" might subject a provider to penalties under § 601 the MTA (SBC Appellant Brief, p 38). Further, these "violations" could be considered prior offenses triggering stiffer penalties—as much as $40,000 per day under § 601—in a subsequent case. The Legislature could not have meant such penalties for innocent mistakes. Thousands of people work in Michigan's telecommunications industry, and inaccurate statements and mistakes are inevitable from time to time. The Legislature's intent was to protect customers from unsavory business practices, not to apply § 502(1)(a) in a "strict liability" sense that would make compliance virtually impossible for even the most conscientious provider, and hold providers to a standard of perfection.

Continued from previous page

(f) Except for an arbitration case under section 252 of part II of title II of the communications act of 1934, chapter 622, 110 Stat. 66, attorney fees and actual costs of a person or a provider of less than 250,000 end-users.

IV. CONCLUSION

For the foregoing reasons, *amicus curiae* Telecommunications Association of Michigan respectfully requests that this Court accept this brief, and find that the term "false" contained in § 502(1)(a) of the MTA includes only intentionally false statements.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

Sherri A. Wellman (P38989)
Michael C. Rampe (P58189)
MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
One Michigan Ave., Ste. 900
Lansing, MI 48933
(517) 487-2070

Attorneys for *Amicus Curiae*
Telecommunications Association of Michigan

Dated: February 27, 2008

LALIB:157713.1\130061-00009